

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD ALLEN BLANKENSHIP,

Defendant-Appellant.

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UNPUBLISHED

June 3, 2003

No. 240594

Schoolcraft Circuit Court

LC No. 00-006255-FC

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree murder, MCL 750.316, unlawful driving away of an automobile, MCL 750.413, and escape from confinement while awaiting trial, MCL 750.197. Defendant was sentenced to life imprisonment without parole for the murder conviction, 3 to 5 years' imprisonment for the unlawful driving away conviction, and 1 to 4 years' imprisonment for the escape from confinement conviction, to be served consecutively. We affirm, but remand for entry of a corrected judgment of sentence.

First, defendant asserts the trial court erred in excluding as hearsay the testimony of defendant's former cellmate regarding statements defendant made to him about the events surrounding the victim's death. Defendant contends the statements were admissible under the hearsay exception regarding statements against interest.

A lower court's determination of whether a statement was against the declarant's penal interest is a question of law, which we review de novo. *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). The determination whether a reasonable person in the declarant's position would have believed the statement to be true and whether the circumstances sufficiently indicated the trustworthiness of the statement depend in part on findings of fact and in part on the application of a legal standard to those facts; the findings of fact are reviewed for clear error, and the decision to exclude the evidence is reviewed for an abuse of discretion. *Id.* at 268-269.

A hearsay statement is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Hearsay statements are inadmissible unless they fall under a specific exception provided by the rules of evidence. MRE 802. Defendant sought to admit the testimony as a statement against interest pursuant to MRE 804(b)(3), which operates only if the declarant is unavailable as a witness and allows admission of:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. [MRE 804(b)(3).]

To determine whether defendant's statement qualifies for admission under this rule, we must consider: "(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement." *Barrera, supra* at 268.

Because defendant invoked his constitutional protection against self-incrimination by declining to testify at trial, he was unavailable as a witness. *Id.*; *People v Schutte*, 240 Mich App 713, 716; 613 NW2d 370 (2000). The statement was against defendant's penal interest because he admitted hitting the victim with a shovel, which tended to subject him to criminal liability. *Barrera, supra* at 270. Also, a reasonable person in defendant's position would not have been likely to make the statement knowing it was false. However, regarding the last factor we must consider, we cannot determine the trustworthiness of defendant's statement because the record is unclear as to the circumstances under which defendant made the statement.

Regardless, even assuming the trial court erred in excluding the evidence, we conclude that any error was harmless because it did not affect the jury's verdict. *Id.* at 290-291. The testimony at issue was cumulative of evidence already presented, and defendant does not explain how the introduction of yet another version of the statement would have affected the jury's verdict.

Second, defendant argues the trial court erred in admitting evidence of defendant's criminal history. Because defendant failed to preserve this issue by objecting to the evidence's admission, MRE 103(a)(1), our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). However, reversal is only warranted when "the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Carines, supra* at 763. We conclude the trial court committed plain error in admitting the evidence, but the error did not affect defendant's substantial rights.

Evidence of a defendant's criminal history is admissible under only limited circumstances. MRE 609 allows evidence of prior convictions to be introduced to impeach a witness. However, defendant did not testify in this case. Therefore, evidence of his past convictions could not be introduced for this purpose.

Evidence of a defendant's prior bad acts may not be admitted to show a person's character, but may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." MRE 404(b)(1). The evidence must be relevant to an issue of fact of

consequence at trial, and the danger of undue prejudice must not outweigh the probative value of the evidence in view of the availability of other means of proof. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2001).

Here, the prosecutor did not seek to introduce the evidence at issue under MRE 404(b), nor was it relevant to any of the probative issues in this case – namely, intent, premeditation, and provocation. The evidence merely referenced the fact that defendant was on probation and had a fugitive bench warrant issued for an unidentified crime. The only purpose the evidence could serve was to establish defendant’s character, an impermissible purpose. Therefore, its admission was plainly erroneous.

However, defendant bears the burden of establishing that the plain error affected his substantial rights, which “requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.* at 763. We find that defendant has not met this burden. The other acts evidence was not highlighted at trial and there was overwhelming evidence of defendant’s guilt. Therefore, we conclude that the error did not affect the outcome or fairness of the trial and reversal is not required.

Finally, defendant contends the trial court erred in omitting credit for time served from his judgment of sentence. At defendant’s sentencing, the trial court indicated he would receive a jail credit of 497 days against his sentence for the unlawful driving away conviction. Yet, defendant’s judgment of sentence does not reflect the credit. Its absence constitutes a clerical error, and we remand to the trial court for entry of a corrected judgment of sentence. MCR 6.435(A).

Defendant also erroneously claims the court granted him a credit against his murder sentence. Allowing a credit toward defendant’s nonparolable life sentence would be counterintuitive. It is axiomatic that one cannot garner credit toward a sentence that ends only with the prisoner’s life. Therefore, the judgment of sentence correctly reflects defendant’s sentence for his murder conviction.

Finally, we note two other clerical errors requiring correction in defendant’s judgment of sentence that defendant did not raise. First, defendant’s murder conviction cites the charge code “MCL 750.316-C.” The proper citation is MCL 750.316. Second, the correct correlating charge code for defendant’s escape from confinement conviction is MCL 750.197, not “MCL 750.1972” as the judgment of sentence indicates.

Affirmed and remanded for entry of a corrected judgment of sentence. We do not retain jurisdiction.

/s/ Michael R. Smolenski  
/s/ Richard Allen Griffin  
/s/ Peter D. O’Connell